

Indigenous Rights and the debate over a  
Charter of Rights in Australia

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Good evening distinguished guest, my Indigenous brothers and sisters and human rights friends and colleagues,

May I begin by acknowledging the Wurundjeri people of the Kulin Nations, the traditional owners of the land where we meet today.

My thanks to the Human Rights Law Resource Centre, in particular to Phil Lynch, for inviting me to address this important gathering of human rights advocates and supporters about what I consider vital for the implementation and promotion of human rights in Australia.

I would also like to begin by acknowledging the presence of our international distinguished guest Gay McDougall and commending her on her tireless effort to promote the rights of minority groups around the world. Gay has had a long and fruitful relationship with the Human Rights and Equal Opportunity Commission, in her capacity as a member of the Committee on the Elimination of Racial Discrimination and through her efforts at the World Conference Against Racism. And we welcome her as a friend.

I would also like to pay my respect to the dignitaries at this gathering, particularly to the Honourable Malcolm Fraser for his unwavering support of Indigenous rights and human rights in this country.

Today I would like to speak about Indigenous human rights in the context of the emerging debate on an Australian Charter of Rights.

A few weeks ago I was honoured and humbled to be entrusted by the national stolen generations representative groups with the responsibility to participate in and later to speak in response to the Prime Minister's Apology to the Stolen Generations.

I was touched by the Apology in all imaginable ways: as the Aboriginal and Torres Strait Islander Social Justice Commissioner; the National Race Discrimination Commissioner and most importantly as the great grandchild of a Stolen Generations woman.

*'Her mother will not part with her'*. This was the chilling account of the officer who reported on my great grandmother in 1899. When I recalled this at the Apology ceremony I had in mind not solely the pain of the past, but also the responsibilities of the present, and the demands upon the future to prevent the violation of basic human rights and dignity, such as the right of a mother to care for her child.

Yet, despite our knowledge of these past events, the spectre of human rights violations remains vivid to many people living in Indigenous communities today. Most recently, we have seen the introduction of the NT intervention that, in the name of protecting children and women from abuse and violence, involves violations of the rights of Indigenous peoples.

The intervention adopts an approach that is entirely inappropriate from a human rights perspective by seeking to justify measures which breach basic human rights on the basis that they are taken to advance other, 'superior' human rights.

No one wants to see children abused, families destroyed, and the aspirations for a bright future dulled because hope has been overwhelmed by despair.

Ultimately, the sustained scrutiny and national debate on issues of violence and abuse in our Indigenous communities creates a momentum for change, and for action.

Clearly we need such action.

Such change should, however, be considered, evidence based, capable of being achieved and systemic.

In my latest *Social Justice Report* to the federal Parliament I argue that measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well being of the communities in which they live in both the short and the longer term.

For example, the Government has clearly stated that the NT intervention seeks to address a breakdown in law and order in Aboriginal communities. And yet it involves introducing measures that undermine the rule of law and do not treat Aboriginal citizens equally.

This places inequality at the heart of the NT intervention measures. Such inequality will inhibit the building of relationships, partnerships and trust between the Government and Indigenous communities. It will also undermine the credibility of the measures, and ultimately, threaten the sustainability and long-term impact of the measures.

Human rights law is clear that any measures must be non-discriminatory in their application and their impact. This obligation is non-negotiable and unable to be deviated from.

Put simply, all measures to address family violence and child abuse should themselves respect human rights. It would be outrageous to suggest that it is not possible to achieve this.

What I want to see is a change to the current model for the intervention so that it is consistent with human rights, and draws on the strengths of communities so they are part of the solution and not just treated as if they are the problem.

My latest *Social Justice Report* to federal Parliament sets out a ten-point plan for making the intervention compliant with human rights. Ultimately, this is about the workability of the NT intervention and enabling it to shift so that it can become a shared ambition, and a partnership with Indigenous communities.

The Ten Point Action Plan for modifying the NT intervention, outlined in detail in the *Social Justice Report 2007*, includes:

**Action 1:** Restore all rights to procedural fairness and external merits review under the NT intervention legislation.

**Action 2:** Reinstate protections against racial discrimination in the operation of the NT intervention legislation.

**Action 3:** Amend or remove the provisions that declare that the legislation constitutes a 'special measure'. This includes by adding provisions to the legislation that require decision makers to exercise their discretion consistent with the beneficial 'special measures' purpose of the legislation.

**Action 4:** Reinstate protections against discrimination in the Northern Territory and Queensland.

**Action 5:** Require consent to be obtained in the management of Indigenous property and amend the legislation to confirm the guarantee of just terms compensation.

For these measures, I challenge anyone to explain how providing these basic democratic protections could possibly hinder the goal of protecting children. The only possible answer is 'short term expedience' prevailing over guarantees of access to justice. And that is not a good enough, and is not a good enough answer.

**Action 6:** Reinstate the CDEP program and review the operation of the income management scheme so that it is consistent with human rights.

**Action 7:** Review the operation and effectiveness of the alcohol management schemes under the intervention legislation.

Actions 6 and 7 seek to address the arbitrariness of the existing regimes for income management and alcohol restrictions provided for under the intervention legislation. The report states that some form of quarantining and some form of alcohol restrictions can be justified consistently with human rights. The sweeping

and discriminatory approach adopted through the legislation, however, is not that approach. The report recommends that the government seek to implement voluntary community based schemes in place of the blanket bans currently provided for.

Action points 8 - 10 then look to how the intervention can transition back to a process that is a partnership with Indigenous communities and where the ambitions are shared rather than imposed. They are as follows.

**Action 8:** Ensure the effective participation of Indigenous peoples in all aspects of the intervention – by developing Community Partnership Agreements.

**Action 9:** Set a timetable for the transition from an ‘emergency’ intervention to a community development plan. And

**Action 10:** is to Ensure stringent monitoring and review processes.

The most revealing indicator that the NT intervention was not consistent with human rights principles was the provision at the centre of the legislative machinery used to support the intervention, namely suspending the operation of Racial Discrimination Act. Further, immunity is provided for any act of discrimination that occurs under the provisions of the intervention legislation. This includes decisions made by bureaucrats or other agents – such as storeowners – in communities. This provides an extraordinarily broad exemption from the protection of discrimination.

In the current government’s review of the intervention measures the first priority should be to reinstate the Racial Discrimination Act. In so doing the government also needs to consider how in the longer term Australia’s Federal anti-discrimination laws can be made more resilient to the exigencies of political manipulation and more effective in achieving their goals of equality and non-discrimination.

There is a need for the Federal Racial Discrimination Act to evolve if it is to remain relevant to contemporary Australian society. Because of this, the *Human Rights and Equal Opportunity Commission* will shortly be releasing the first of a series of research papers aimed at assessing the effectiveness of the Act, and highlighting the need for future reform.

For instance the ability of the Racial Discrimination Act to deal with systemic discrimination, as well as individual complaints, needs to be improved. In addition, the burden of proof in race discrimination cases is so onerous that many incidents of racism occur without legal redress. This needs to be reviewed.

The first research paper about to be released seeks to contribute to an analysis of the continuing usefulness and effectiveness of the RDA by placing it in context with contemporary race discrimination legislation in Canada, the United Kingdom (U.K.), the United States (U.S.) and the European Union (E.U.). By looking at the way in which other similarly placed nations have responded to the problems of racial discrimination and inequality, we are presented with a series of alternative models against which the current Australian legislation may be compared. Recent

developments in these jurisdictions may suggest potential directions for legislative reform.

History tells us that neither democracy nor laws stop politicians and public authorities from pursuing a course of action simply because it overrides the collective or individual rights of minority groups. Anna Katzmann, president of the NSW Bar Association, in the context of the debate about the bill of rights in NSW, rebuffed the common argument that says our political structure has served us well since federation and that the founding fathers themselves didn't recommend a bill of rights. As Katzmann rightly observes; 'Yet, these are the same men who did not think that Aborigines should be counted as members of the Australian populations. These are the same men who were determined to ensure that governments could discriminate against 'coloured aliens'.

The NT intervention among other examples (such as native title amendments in 1993) show us that the issue of basic human rights should not be left solely in the hands of a particular government or be subject to the exigencies of a particular set of circumstances. We need to have a more comprehensive legal net to protect human rights in Australia.

In the environment created by the Prime Minister's Apology, I believe that a Charter of Rights in Australia — which specifies those fundamental rights that should never be compromised other than in grave exceptional circumstances — will assure all Australians, Indigenous and non-Indigenous, that their basic rights are protected.

Some would say that a Charter of Rights in general terms protects the rights of individuals not the collective, so how would it aid Indigenous people in our struggle to have our collective rights recognised. I have in mind a few responses:

1. Yes a Charter of Rights is not adequate by itself to deal with Indigenous issues but is nevertheless an important element of a holistic approach that includes: capacity building; governance measures, and effective participation in government policy and service delivery.
2. Indigenous people - as individuals - should have the protection of a Charter of Rights as a supplement to, rather than a substitute for, their collective rights to self-determination and cultural identity.
3. The protection of equality and non-discrimination through a Charter of Rights may not necessarily exclude the recognition of peoples' collective right to enjoy their culture. A Charter that protects economic, social and cultural rights, as well as political and civil rights, would contribute positively to the much-needed recognition of Indigenous rights.

The enactment of a Charter of Rights does not mean that we no longer demand the recognition of the distinct status of Indigenous Australians. Indigenous peoples are the First Peoples of this land not simply a dispersed collection of disadvantaged communities or a minority group with special needs. The unique status of Indigenous peoples should be recognised in the Constitution as a prerequisite for a genuine process of reconciliation and the promotion of a human

rights culture. In addition, and at the same time, Constitutional change will be necessary to ensure that recognition, once it comes, is not whittled back in the eternal swings and roundabouts of politics.

I have called on the government to consider the Canadian constitutional precedent of recognising and affirming Aboriginal rights in Section 35 of the Canadian Constitution. Such a provision in the Australia Constitution might read as follows:

*The pre-existing rights of Aboriginal peoples in Australia are hereby recognised and affirmed, consistent with international human rights standards.*

I strongly support the introduction of an Australian Charter of Rights because it provides protection to all Australians. I also think a Charter would provide a convivial environment to progress the struggle of Indigenous people towards the more substantive rights pertaining to our status as a people.

The issues I raise this evening may appear to some to be essentially 'Australian'. One of the great benefits of bringing people like our esteemed guest, Gay McDougall to Australia, is that we are provided with a broader perspective that sees these domestic issues as part of global trends, patterns and protections.

A few years ago many of us here tonight turned on the evening news to become spectators of a race riot that was taking place in a local municipality of Sydney but could've been taking place in London, Paris or anywhere in Europe.

The underlying forces of discontent and conflict being played out in Cronulla in 2005 were not that different to those present in the social discontent manifesting throughout the world then and today.

On behalf of everyone I thank Gay McDougall for her precious insights that will enable us to understand and address these matters of common concern.

Thank you